

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

3:12cv472

[3:03cr127]

RICHARD OLTON,

Petitioner,

Vs.

UNITED STATES OF AMERICA,

Respondent.

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ORDER

THIS MATTER is before the court on petitioner's pro se Motion for Relief under United States v. Simmons, 649 F.3d 237 (4th Cir. 2011). On August 30, 2012, this court conducted an initial review of such motion and determined that there were sufficient allegations to have such motion screened under the court's *Administrative Order*, 3:12mc92. In complying with such Order, the FDO has conducted an initial screening and determined that petitioner is not entitled to representation by the FDO's office as the petitioner's predicate state court sentence (five years suspended) was entered in 1993, before Structured Sentencing, *and* was a sentence in excess of one year. The fact that such sentence was suspended has no relevance under Simmons. United States v. Thompson, No. 11-5059, 2012 WL 1592991 * 1 (4th Cir. 2012).

The court has considered the pending motion and determined that, to the extent petitioner seeks relief under 28, United States Code, Section 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, based on Simmons, petitioner does not state a viable claim.

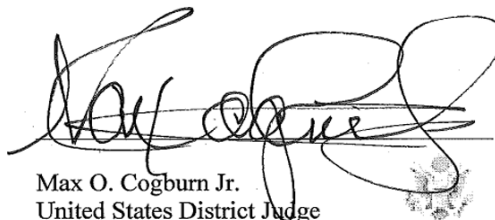
ORDER

IT IS, THEREFORE, ORDERED that as to petitioner's claim made under Simmons, such claim is summarily **DISMISSED** upon initial screening as Simmons is inapplicable to petitioner's case and such is a "second or successive" petition under 28 U.S.C. § 2255 as to which petitioner has neither sought nor received permission from the Court of Appeals to file.

Denial of Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, this court declines to issue a certificate of appealability as petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484-85 (2000) (in order to satisfy § 2253(c) when court denies relief on procedural grounds, a petitioner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right).

Signed: December 8, 2012



Max O. Cogburn Jr.
United States District Judge